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Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 67

JEFFERSON LAKE SULPHUR COMPANY,
Petitioner and Appellant Below,

versus

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

BRUNSWICK G. DEUTSCH,
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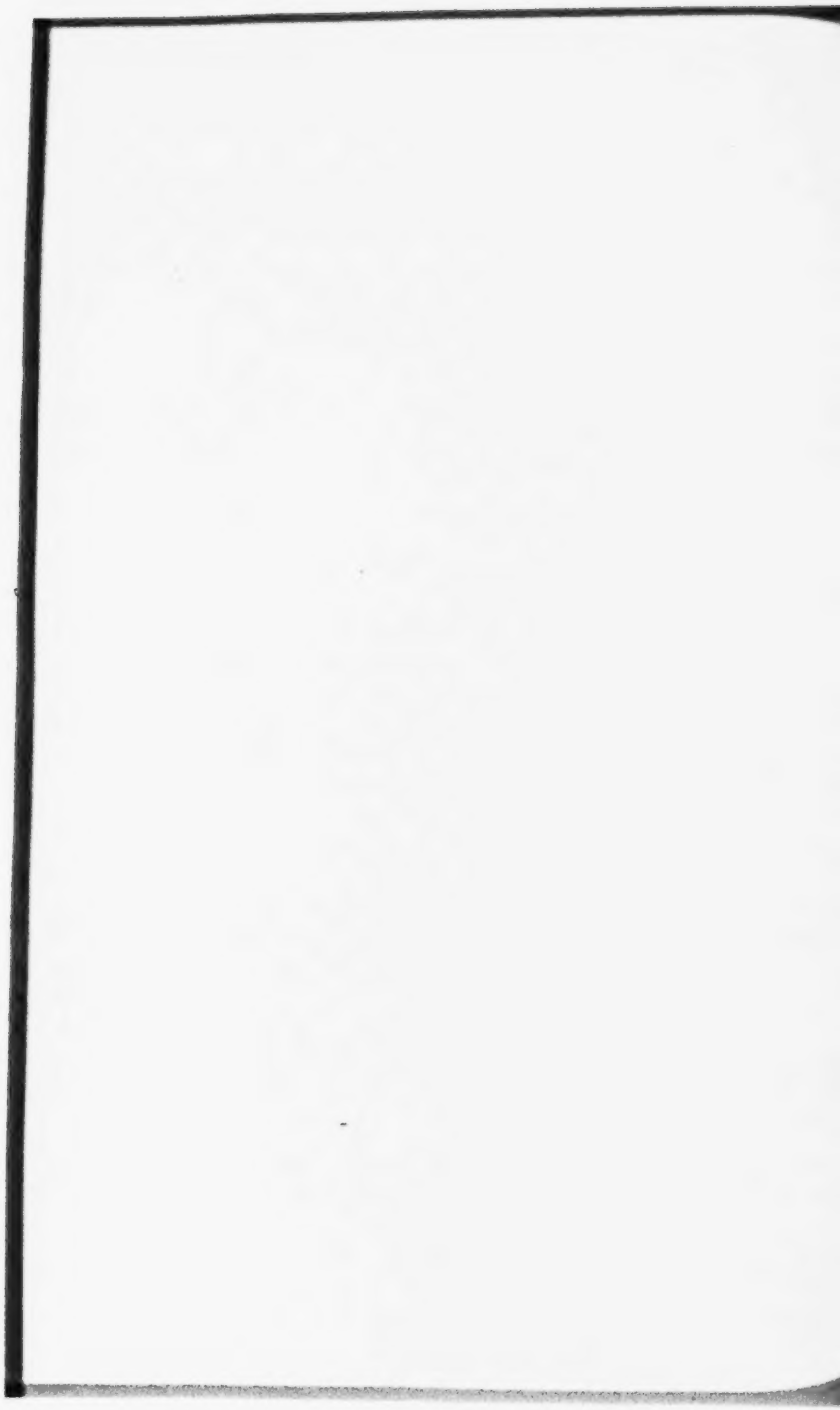
RENÉ H. HIMEL, JR.,
DEUTSCH, KERRIGAN & STILES,
Of Counsel.



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BLEEDTHRU

Are stamp taxes on original issues and transfers of corporate stock properly imposed on the issue, in connection with a change of corporate domicile, of stock certificates in exchange for outstanding certificates representing the same stock, without change of any kind in the corporate structure except such change of domicile?

Are such taxes properly imposed on certificates for treasury stock?

II

Summary Statement of Matter Involved

In 1949, the corporation then named Jefferson Lake Sulphur Company, Inc., was domiciled in Louisiana. In that year, it was determined to change the domicile of the corporation to New Jersey. This change was effected by organizing a New Jersey corporation, the present petitioner, identically the same in all respects as the Louisiana corporation, and merging the Louisiana corporation into it.[1]

The only changes resulting from the merger were a slight modification in name, by omission of the suffix "Inc.", and the shifting of the corporate domicile to New Jersey. In all other respects—in corporate and financial structure, in assets and liabilities, in management, in business, in shareholders and directors—the corporation remained exactly the same.[2]

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[1] R 2, 35, 40, 42-47.
[2] R 37, 38.

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Under the merger agreement,[3] stock certificates of the Louisiana corporation, outstanding at the time of merger, were exchanged for new certificates issued after the merger—omitting the suffix to the corporate name and bearing the name of the new state of domicile—on the basis of share for share of the same class of stock. New treasury certificates have been made out in petitioner's name to supplant those existing before the merger.[4]

Having been advised, upon inquiry, that the Commissioner of Internal Revenue considered stamp taxes both on original issues, and on transfers, of corporate stock to be due on issuance of the certificates described in the preceding paragraph, petitioner purchased, affixed and cancelled tax stamps in the amount claimed by the Commissioner to be due on those block issuances. Petitioner's subsequent claim for refund of the money paid for the tax stamps was denied,[5] and this suit for the refund was then instituted.

The Court of Appeals for the Fifth Circuit, affirming the trial court's decision rendered on cross motions for summary judgment, held that petitioner is an entity distinct from the former Louisiana corporation and that accordingly the original-issue tax was due. The appellate court also held, citing this court's decision in *Raybestos-Manhattan vs United States*,[6] that the issuances involved taxable transfers of rights of the former Louisiana corporation to stock in petitioner.

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[3] R 14.
[4] R 37, 38.
[5] R 5, 6-8, 36.
[6] 296 US 60 (1935).

BLEEDTHRU

III

Reasons Relied on for Allowance of the Writ

The Court of Appeals for the Fifth Circuit, in its holding with respect to the original-issue tax, has run counter to opinions of the Courts of Appeals for the Second and Seventh Circuits on the point; and, in its ruling on the transfer tax, has joined the Courts of Appeal for the Seventh and Eighth Circuits in misapplying a decision of this court.

This court has never had occasion to decide a case involving the original-issue tax, and its basic opinion on the transfer tax, rendered almost twenty years ago, has since been subject to widespread misconstruction, of which this case is an example.

The holding below on the applicability of the original-issue and transfer taxes to treasury certificates, is the first reported decision on that question, and is, it is submitted, unsound.

Certiorari should be granted to resolve the conflict in principle among the circuits as to the original-issue tax; to correct the misconstruction of this court's opinion on the transfer tax; and to settle authoritatively the novel and important question of the applicability of these taxes to treasury certificates.

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IV

Basis of Jurisdiction

Jurisdiction is invoked under section 1254 of Title 28 of the United States Code.

The opinion of the Court of Appeals for the Fifth Circuit was rendered on April 15, 1952, and has not been reported as this petition is filed.

Wherefore petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket, No. 13,791, *Jefferson Lake Sulphur Company, Appellant, vs United States of America, Appellee,* to the end that this cause may be reviewed and determined by this court as provided by the statutes of the United States; that the judgment herein of said Court of Appeals be reversed by this court; and for such other and further relief as this court may deem proper.

BRUNSWICK G. DEUTSCH,
Counsel for Petitioner.

RENÉ H. HIMEL, JR.,
DEUTSCH, KERRIGAN & STILES,
Of Counsel.

New Orleans,
May ..., 1952.

EEDTHRU

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1951

No.

JEFFERSON LAKE SULPHUR COMPANY,
Petitioner and Appellant Below,

versus

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion of the Court of Appeals for the Fifth Circuit, annexed to the record, was filed on April 15, 1952, but has not as yet, so far as counsel can learn, been reported.

The District Court for the Eastern District of Louisiana rendered no opinion.[1]

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[1] The court merely cited one decision in support of its order. R 49.

II

Jurisdiction

Jurisdiction is invoked under section 1254 of Title 28 of the United States Code.

As shown in the petition for writ of certiorari in support of which this brief is filed, the Court of Appeals has decided significant questions as to the scope and effect of the stamp taxes on original issues and on transfers of corporate stock. The decision on the original-issue tax conflicts in principle with decisions of other Courts of Appeal; this court has never passed on the scope of the original-issue tax. The decision on the transfer tax was rendered in apparent accord with, but in actual misapplication of, a basic decision of this court with reference to that tax. This is the first decision of any court on the applicability of the original-issue and transfer taxes to treasury certificates.

This conflict of decisions on the one tax, misapprehension of this court's position on the other, and novel issue as to the applicability of either to treasury certificates, should be resolved decisively by this court.

III

Statement of the Case

The preceding petition for writ of certiorari contains a "Summary Statement of the Matter Involved",[2] which is

[2] See pages 2-3, ante.

adopted, without repetition, as the "Statement of the Case" of this brief.

IV

Specification of Errors

The court erred in deciding that stamp taxes on original issues, and on transfers, of corporate stock are properly imposed (a) on the issue, in connection with a mere change of corporate domicile, of stock certificates in exchange for outstanding certificates representing the same stock, without change of any kind in the corporate structure except such change of domicile; and (b) on treasury certificates, in the corporation's name, supplanting such certificate existing before the change of domicile.

V

Summary of the Argument

Point A

The issue of stock certificates, in connection with a mere change of corporate domicile, in exchange for outstanding certificates representing the same stock, unaccompanied by any other corporate change whatever, is not an original issue of stock.

Point B

The issue of stock certificates, in connection with mere change in domicile, in exchange for outstanding certifi-

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cates representing the same stock, involves no transfer of stock.

Point C

Treasury certificates do not represent stock; and hence the "issue" of treasury certificates can constitute neither an original issue nor a transfer of stock.

VI

Argument

Point A

The issue of stock certificates, in connection with a mere change of corporate domicile, in exchange for outstanding certificates representing the same stock, unaccompanied by any other corporate change whatever, is not an original issue of stock.

The original issue tax was not due here because the issuances in suit were not original issues of shares in an enterprise in exchange for contributions to its capital, but were replacement issues of certificates in exchange for outstanding certificates representing the same corporate interests, and unaccompanied by further capital contributions.[3]

[3] Such replacement issues are not subject to the original issue tax. United States vs Pure Oil Co., 135 F2d 578 (CA 7-1943); Bowers vs West Virginia Pulp & Paper Co., 297 Fed. 225 (CA 2-1924), cert. den., 265 US 584; Edwards vs Wabash Ry. Co., 264 Fed. 610 (CA 2-1920); Trumbull Steel Co. vs Routzahn, 292 Fed. 1009 (ND Ohio-1923), error dis., 300 Fed. 1006 (CA 6-1924); Goodyear Tire & Rubber Co. vs United States, 60 Ct. Cl. 448 (1925); Cuba Railroad Co. vs United States, 60 Ct. Cl. 272 (1925); Cleveland Provision Co. vs Weiss, 4 F2d 408 (ND Ohio-1925); In re Grant-Lees Gear Co., 1 F2d 393 (ND Ohio-1924); Standard Mfg. Co. vs Heiner, 300 Fed. 252 (WD Pa.-1924); American Laundry Machinery Co. vs Dean, 292 Fed. 620 (SD Ohio-1923); Internal Revenue Regulation 71 (1941), section 113.25(c), (f). The Court of Claims traces the history of this principle in Crown Cork & Seal Co. vs United States, 94 FS 117 (Ct. Cl.-1950).

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The entire transaction of petitioner's formation was obviously not the creation of a new, independent entity, but a mere change of domicile of the identical enterprise to another state.[4] This is particularly inescapable since the change of domicile was accomplished through the peculiarly intimate process of merger.[5]

While, as this court noted in *Marr vs United States*,[6] a corporation organized under the laws of one state has not exactly the same rights and powers as a corporation organized under the laws of another state, surely this circumstance alone cannot, at least in the absence of a showing that any such technical differences could not have been imported into the Louisiana corporation by action of its shareholders, convert a simple change of domicile into the creation of an entirely separate enterprise.[7]

The quotation cited by the Court of Appeals from this court's opinion in *New Colonial Ice Company vs Helvering*,[8] as to the effect of a sale of assets from one corporation to another on carry-over provisions of the Internal Revenue Code, is inapropos to a consideration of the effects of the instant merger.[9] More fundamentally, the *New Colonial*

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[4] "A mere change in identity, or of place of organization, of a corporation, effects a reorganization of the corporation . . . not the creation of a new and substantially different corporation." Shreveport-El Dorado Pipe Line Co. vs McGrawl, 63 F2d 202, 204 (CA 5-1933). Accord: Pioneer Pole & Shaft Co. vs Commissioner, 55 F2d 861 (CA 6-1932). See also Weiss vs Stearn, 265 US 242 (1924).

[5] The effect of merger is to "drown" the personality of one corporation into another to form an "all embracing whole". Helvering vs Metropolitan Edison Co., 306 US 522 (1939); Stanton Brewery vs Commissioner, 176 F2d 573 (CA 2-1949); New Jersey Revised Statutes 14:12-3; Louisiana Revised Statutes 12:51A.

[6] 268 US 536 (1925).

[7] See Shreveport-El Dorado Pipe Line Co. vs McGrawl, 63 F2d 202 (CA 5-1933); Pioneer Pole & Shaft Co. vs Commissioner, 55 F2d 861 (CA 6-1932).

[8] 292 US 435 (1934).

[9] See Helvering vs Metropolitan Edison Co., 306 US 522 (1939); Stanton Brewery vs Commissioner, 176 F2d 573, 575 (CA 2-1949).

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case involved questions of te
whereas the applicability of the
solely on the distinct, if per
identity of stock, of interests i

al corporate identity,
ginal issue tax depends
related, question of
business enterprise.[10]

Granted *arguendo* that the c
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shareholders retained througho
the same business enterprise.
of certificates, representing th
not constitute an original issue

ations here concerned
fact remains that the
the same interests in
rdingly, the exchange
same interests, could
tock.

The misplaced reliance of the
and *New Colonial* decisions rep
struction of their scope and app
holding that the original issue
at bar conflicts in principle wi
cited in footnote 3 above.

rt below on the *Marr*
nts a serious misconbility; and that court's
s due in the situation
he appellate decisions

Point B

The issue of stock certif
with mere change in domi
outstanding certificates re
stock, involves no transfer o

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[10] ". . . difficult and complex questio
are unnecessary to the simple dete
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Treasury vs Crowder, 214 Ind. 252, 584 (1865); Department of
Co. vs. Arlington Hotel Co., 11 Del. 65 (1938); John W. Cooney
Adm'r vs Condon, 56 W. Va. 416, 4
17 Tex. Civ. App. 382, 391 (1897);
Co., 75 NY 211, 216 (1878); Ballan
Treasury Shares, 34 Cal. L. Rev. 53

of corporate identity . . .
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Brewery vs Commissioner,
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nd business of the corpora-
286, 311 (1917); Lipscomb's
(1904); Thayer vs Wathen,
rrall vs Bushwick Railroad
ne, The Curious Fiction of
538 (1946).

BLEEDTHRU

It is submitted that this court's opinion in *Raybestos-Manhattan vs United States* is not authority for imposing the stock transfer tax in the situation at bar.[11]

In that case, two independent going concerns (A and B) were amalgamated to form a third (C), whose stock was then issued to the quondam shareholders of A and B. Patently, a former shareholder of A, when he received stock in C, received an additional business interest—in the assets of the enterprise formerly constituting B—which he had never held before. The transfer tax was accordingly properly imposed.

In the case at bar, involving a mere change of domicile of the same business enterprise, the shareholders, when they received petitioner's certificates, received no business interest which they did not already hold.[12] Accordingly, no transfer of stock occurred.[13]

The Court of Appeals, in apparently forsaking its former correct decision in just this situation,[14] as well as the Courts of Appeals for the Seventh [15] and Eighth [16] Circuits, have misapplied this court's *Raybestos-Manhattan* holding.

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[11] Especially since the instant case involves merger rather than sale of assets as in Raybestos-Manhattan. Stanton Brewery vs Commissioner, 176 F2d 573 (CA 2-1949), illustrates the disparity between the two types of cases as respects the continuing identity of corporate rights and interests.

[12] Organization of a corporation to take over the assets and liabilities, and continue the business, of an existing one, is not "something which gives the stockholder a thing really different from what he theretofore had". Weiss vs Stearn, 265 US 242, 254 (1924). Accord: Pioneer Pole & Shaft Co. vs Commissioner, 55 F2d 861 (CA 6-1932).

[13] See Shreveport-El Dorado Pipe Line Company vs McGrawl, 63 F2d 202 (CA 5-1933).

[14] Ibid.

[15] United States vs Vortex Cup Co., 84 F2d 925 (CA 7-1936).

[16] American Gas Machine Co. vs Willcuts, 87 F2d 924 (CA 2-1937).

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Point C

Treasury certificates do not represent stock; and hence the "issue" of treasury certificates can constitute neither an original issue nor a transfer of stock.

What has been said above applies as well to the new certificates made out in the corporation's own name (insofar as they may be considered stock certificates at all).[17] But there are other, equally important, reasons why the latter certificates are subject to no stamp taxes on stock.

When a corporation is formed, its shareholders contribute to its capital and receive stock in exchange. When a shareholder wishes to surrender his stock, the corporation—if it assents—returns his capital interest to him, and his interest in the corporation ceases to exist.

But since that stock was once issued, it may be reissued without regard to the restrictions imposed on original issues. For this reason the corporation must keep a careful record of stock which has been issued and surrendered.

The usual method of keeping the record is to make out a certificate in the corporation's name, for the number of shares surrendered. Manifestly, this is not a stock issue, and the certificate does not represent stock in any sense.

A corporation can obviously neither issue to itself, nor hold, an interest in itself. "Treasury stock" has no voting or other management rights. It necessarily cannot share in dividends or in the assets of the corporation upon dissolution. No capital contribution is or can be paid by the corporation in exchange for it.

[17]Attention is particularly called to Internal Revenue Regulation 71 (1941), section 113.25(c), (f).

BLEEDTHRU

Treasury certificates are merely a
and since they form a record of stock
exist, they are the very antithesis bookkeeping system,
called.[18] which has ceased to

The opinion of the Court of Appea of stock properly so
tion in the case at bar ignores the fo
completely. s on this novel ques-

egoing considerations

CONCLUSION

It is respectfully submitted that f
in the petition and in this brief, a wr
issue herein to enable this court to r the reasons stated
principle between the decision belo of certiorari should
decisions on the scope of the original solve the conflict in
never before considered by this cou and other appellate
apprehension of various Courts of Assue tax—a question
import of this Court's basic opinion; to correct the mis-
and to settle at once the novel and peal as to the proper
the applicability of either tax to tron the transfer tax;
nportant question of
BRUNSWsury certificates.
Counsel

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r Petitioner.

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DEUTSCH, KERRIGAN & STILES
Of Counsel.

New Orleans,
May, 1952.

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[18] See Ballantine, The Curious Fiction of
Rev. 536 (1946). "Their existence
fiction . . . Treatment (of them as
poses only". Ibid., at pp. 537-9. "T
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asury Shares, 34 Cal. L.
issued shares is a pure
asset) is for record pur-
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ev. 625, 638 (1929).

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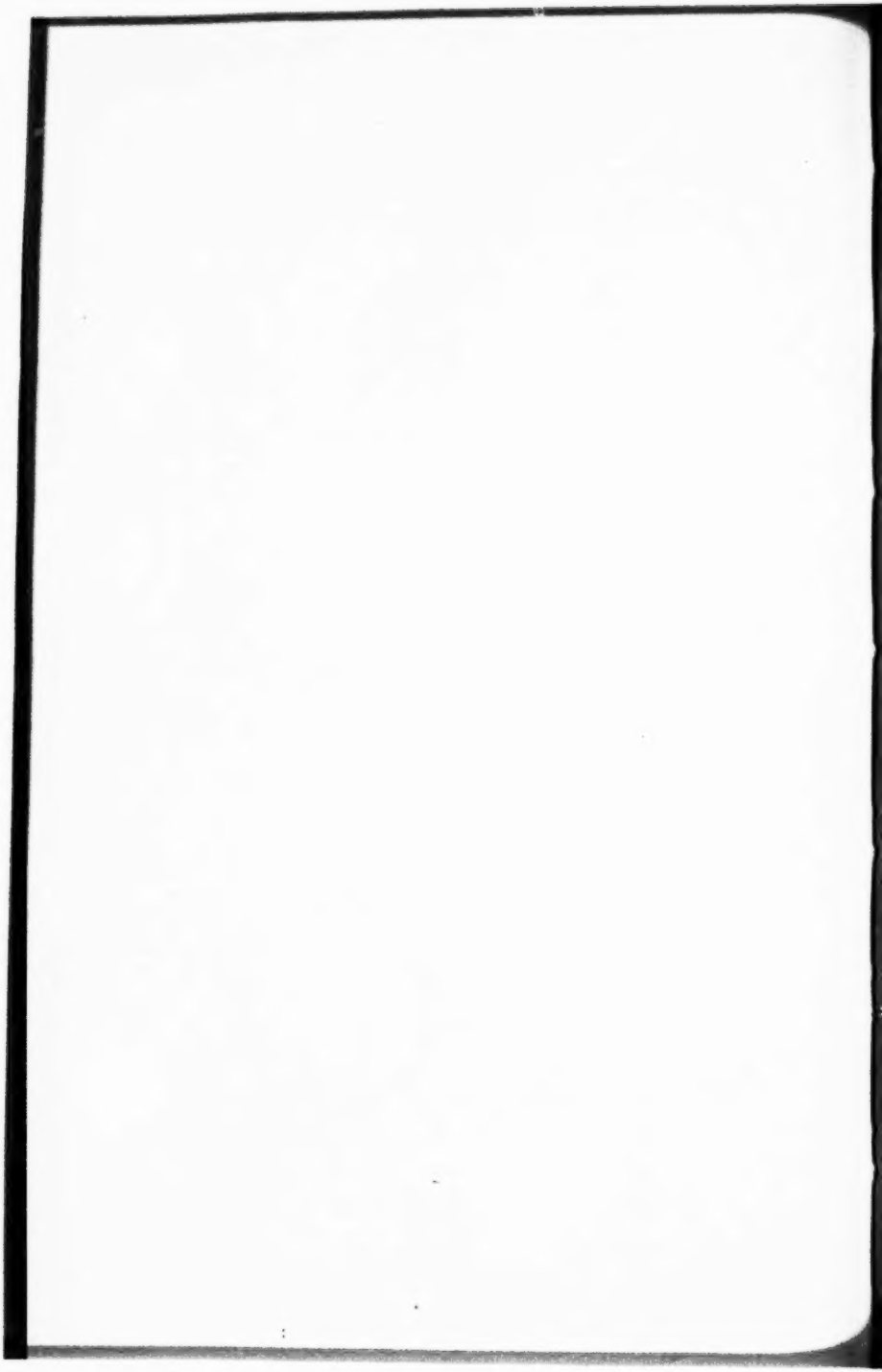

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 67

JEFFERSON LAKE SULPHUR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 55-59) is not as yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1952. (R. 60.) The petition for a writ of certiorari was filed May 16, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDTHRU

QUESTIONS PRESENTED

Taxpayer is a New Jersey corporation which was organized for the purpose of taking over the assets and assuming the liabilities of a Louisiana corporation. It is in all substantial respects identical in corporate, financial, and physical structure with its predecessor Louisiana corporation. The questions presented are:

1. Whether the stamp taxes imposed by Section 1802 of the Internal Revenue Code on original issues and transfers of stock are applicable to the stock issued by taxpayer directly to the shareholders of its predecessor Louisiana corporation.

2. Whether the stamp taxes imposed by Section 1802 on original issues and transfers of stock are applicable to the treasury stock issued by taxpayer in the same number of shares as had been held as treasury stock by the predecessor Louisiana corporation prior to its merger with taxpayer.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 11-15.

STATEMENT

This case originated as a suit for refund of stamp taxes paid by the Jefferson Lake Sulphur Company, a New Jersey corporation, hereinafter called the "taxpayer". In the District Court both parties filed motions for summary judgment. (R. 39-48.) The District Court granted the motion of the

United States (R. 49) and the judgment was affirmed on appeal (R. 60).

The facts, consisting principally of the admitted allegations of taxpayer's complaint, as amended, including exhibits attached thereto, may be summarized as follows:[1]

Taxpayer is a New Jersey corporation which is authorized to do business in the State of Louisiana and has its principal business office in the City of New Orleans. (R. 48.) It is the surviving corporation in a merger with Jefferson Lake Sulphur Company, Inc., a Louisiana corporation (hereinafter called the "Louisiana corporation" or "predecessor corporation"), pursuant to the terms of an agreement dated June 23, 1949 (R. 2-3), which is set forth at R. 8-20.

The Louisiana corporation had an authorized capital stock of $5,500,000 divided into 500,000 shares of preferred stock at the par value of $10 a share and 500,000 shares of common stock at the par value of $1 a share. There were issued and outstanding certificates for 114,032 shares of preferred stock and 348,246 shares of common stock, apparently exclusive of treasury shares. (R. 10-11.)

Taxpayer, the New Jersey corporation, was incorporated March 30, 1949. (R. 2.) Under its certificate of incorporation, as amended, its authorized

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[1] Taxpayer filed an affidavit and exhibits in support of its motion for summary judgment, but those documents add little, if anything, of significance.

capital stock is $5,500,000 consisting of 500,000 shares of preferred stock at a par value of $10 a share and 500,000 shares of common stock at a par value of $1 a share. (R. 9.) Prior to the merger of the Louisiana corporation with taxpayer, the only stock issued by taxpayer was 1,011 shares of common stock. Of these, 1,000 shares were issued to the Louisiana corporation as qualifying shares and one share was issued to each of taxpayer's eleven directors, who had constituted the board of directors of the Louisiana corporation. (R. 2-3.)

The merger agreement was approved by the board of directors of both corporations on June 23, 1949, was adopted by the stockholders of both corporations on July 26, 1949, and was filed with the Secretary of State of New Jersey on December 31, 1949. (R. 3.) Under the agreement it was agreed, among other things, that, upon notice given by taxpayer not later than 60 days following the effective date of the merger, each holder of preferred and common stock of the Louisiana corporation, upon surrender of the certificate or certificates therefor, was to receive one share of the same class of stock of taxpayer for each share of stock of the Louisiana corporation so surrendered. (R. 14-15.)

The Louisiana corporation was dissolved as of December 31, 1949. (R. 3.) Thereupon, taxpayer acquired all of the rights and property, and assumed all of the obligations, of the Louisiana corporation. Taxpayer is, in all substantial respects, identical in corporate, financial and physical structure with its predecessor Louisiana corporation.

The officers, directors and all other personnel of the Louisiana corporation continued after the merger with taxpayer in their same capacities. (R. 37.)

Practically all of the stock of the Louisiana corporation has been exchanged, share for share, for taxpayer's stock of the same class and par value. The 1,011 qualifying shares of common stock issued by taxpayer prior to the merger have been surrendered to taxpayer. Treasury shares have been issued by taxpayer, in its name, to the number of treasury shares held by the Louisiana corporation immediately prior to the merger. (R. 37-38.)

Under date of October 20, 1949, which was prior to the merger, taxpayer sought a ruling from the Commissioner of Internal Revenue as to liability for documentary stamp taxes in connection with the merger. (R. 5, 20-22.) The Commissioner replied by letter dated November 15, 1949, explaining taxpayer's liability in detail. (R. 22-24.)

On January 9, 1950, taxpayer purchased, affixed and cancelled stamps in the amount of $2,683.34 covering (1) original issue taxes on the block issuance of 355,595 one-dollar par value common shares (comprising 1,011 qualifying shares, 6,584 treasury shares issued in taxpayer's name, and 348,000 shares issued or subject to issuance to shareholders of the predecessor corporation) and 132,173 $10 par value preferred shares (comprising 21,645 treasury shares issued in taxpayer's name and 110,528 shares issued or subject to issuance to shareholders of the predecessor corporation) and (2)

transfer taxes on the block issuance of 354,584 $1 par value common shares (comprising 6,584 treasury shares issued in taxpayer's name and 348,000 shares issued or subject to issuance to shareholders of the predecessor corporation) and 132,173 $10 par value preferred shares (comprising 21,645 treasury shares issued in taxpayer's name and 110,528 shares issued or subject to issuance to shareholders of the predecessor corporation). (R. 6-7.) On January 31, 1950, taxpayer filed a claim for refund of the $2,683.34 paid as stamp taxes. (R. 25-31.) The claim was rejected by the Commissioner on June 28, 1950 (R. 31-34), and this suit followed.

ARGUMENT

This case involves the applicability of Section 1802 of the Internal Revenue Code, Appendix, *infra*, pp. 11-12. Paragraph (a) of that section imposes a stamp tax on each original issue of shares or certificates of stock by any corporation and paragraph (b) imposes a stamp tax on transfers of corporate stock. In *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, which involved the issuance of stock by a newly-formed corporation in effectuation of a merger of two other existing corporations, it was held that the stock issued by the taxpayer-corporation directly to the shareholders of the merging corporations was subject to the transfer tax. Since stock which has been transferred must necessarily have been originally issued, the *Raybestos-Manhattan* decision is authority as to the applicability of both the original-issue and

transfer taxes in respect of mergers. That decision supports the decision below in the present case and, contrary to taxpayer's assertions, has been properly construed and applied by the courts without conflict between the circuits.

1. Taxpayer is incorrect in stating (Pet. 4) that the decision below is in conflict with decisions of the Second and Seventh Circuits in respect of the original-issue tax. In argument the alleged conflict is reduced to a conflict in principle (see Br. 11) with a number of decisions (fn. 3, Br. 9), including decisions of the Second and Seventh Circuits, in which it was held that the original-issue tax does not apply to what taxpayer calls "replacement issues" of stock (Br. 9), consisting of new stock issued in exchange for old stock of the same corporation without any accompanying addition to the capital of the corporation. Taxpayer's assertion of conflict with such decisions assumes that taxpayer is the same corporate entity as its predecessor Louisiana corporation (See Br. 10-11). As the court below correctly held (R. 58-59), taxpayer is an entirely new corporation, created under the laws of a different state.[2] Contrary to taxpayer's alternative suggestion (Br. 11), it is immaterial that, despite the creation of a new corporation, the shareholders may have retained substantially the same interest in the same business enterprise. By

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[2] One reason why two corporations organized under the laws of different states are separate entities is that a corporation organized under the laws of one state does not have the same rights and powers as one organized under the laws of another state. *Marr* v. *United States*, 268 U. S. 536.

Section 1802 (a) the original-issue tax is imposed on the original issue of stock by any corporation and, since taxpayer is a new and different corporation from the Louisiana corporation, its issuance of stock was an original issue as to it, resulting in an addition to its capital consisting of the capital of the Louisiana corporation. The decisions of other circuits involving facts similar to the present case, in which only the transfer tax was in issue, are consistent with the decision below. See *United States* v. *Vortex Cup Co.*, 84 F. 2d 925 (C.A. 7); *American Gas Machine Co.* v. *Willcuts*, 87 F. 2d 924 (C.A. 8).[3]

2. There is no basis for taxpayer's assertion (Pet. 4; Br. 12) that, as to the transfer tax, the court below and the Courts of Appeals for the Seventh and Eighth Circuits in the *Vortex Cup Co.* and *American Gas Machine Co.* cases, *supra*, misconstrued and misapplied this Court's decision in the *Raybestos-Manhattan* case. The *Raybestos-Manhattan* case is of course distinguishable on its facts, since the imposition of the transfer tax there upheld was on stock issued by a newly-formed corporation with which two other existing corporations were merged, whereas in the present case and in the Seventh and Eighth Circuit cases cited above the stock was issued by a corporation with which only one other corporation was merged. However, under the *Raybestos-Manhat-*

[3] The only other case in point on its facts is *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl*, 63 F. 2d 202 (C.A. 5), in which, prior to this Court's decision in the *Raybestos-Manhattan* case, the court below had reached a decision opposite to its present decision. The court below recognized that the *Raybestos-Manhattan* decision reflects the incorrectness of its *Shreveport-El Dorado Pipe Line Co.* decision. (R. 58.)

tan decision the transfer tax is imposed on the theory that there was a transfer by the merging corporations, to their shareholders, of their right to receive stock in the new corporation by virtue of their transfer of assets to the new corporation. Such a situation inheres in the instant situation just as well as in a merger of two corporations with a third. Indeed, the *Raybestos-Manhattan* decision contains its own refutation of taxpayer's contention that the decision has been improperly construed and applied to stock issued on a merger of only one corporation with another newly-formed corporation. As the court below noted (R. 57-58), in the *Raybestos-Manhattan* case this Court stated that certiorari was granted to resolve a conflict with *MacLaughlin* v. *Westmoreland Coal Co.*, 73 F. 2d 1004 (C.A. 3), a case in which the facts were indistinguishable from those of the present case and the *Vortex Cup Co.* and *American Gas Machine Co.* cases.

3. Contrary to taxpayer's assertion (Pet. 4; Br. 13-14), no question warranting further review is here presented as to the applicability of the original-issue and transfer taxes to the shares issued by taxpayer as treasury stock. Such shares were in fact part of the original issue of stock by taxpayer. The number of shares issued as treasury stock was the same number as had been held as treasury stock by the Louisiana corporation. The issuance of the shares in taxpayer's name represented a transfer to taxpayer by the Louisiana corporation of its right to receive that number of shares and the

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Respectfully submitt

PHILIP B

ELLIS N. LMAN,
Acting Assista icitor General.

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APPENDIX

Internal Revenue Code:

SEC. 1802. CAPITAL STOCK (AND SIMILAR INTERESTS).

(a) [As amended by Sec. 521 (a)(4), Revenue Act of 1941, c. 412, 55 Stat. 687, and the Act of August 8, 1947, c. 518, 61 Stat. 921] *Original Issue.*— On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, * * * on each $100 of par or face value or fraction thereof of the certificates issued by such corporation * * * 11 cents: * * * *Provided further,* That where such certificates (or shares, where no certificates are issued) are issued in a recapitalization, the tax payable shall be that proportion of the tax computed on such certificates or shares issued in the recapitalization that the amount dedicated as capital for the first time by the recapitalization, whether by a transfer of earned surplus or otherwise, bears to the total par value (or actual value if no par stock) of such certificates or shares issued in the recapitalization. The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued.

(b) [As amended by Sec. 521 (a)(5), Revenue Act of 1941, *supra*] *Sales and Transfers.*— On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of

legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 5 cents and where such shares or certificates are without par or face value, the tax shall be 5 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be): * * *

* * * * *

(c) [As added by Sec. 506 (b)(1), Revenue Act of 1942, c. 619, 56 Stat. 798] *Transfers by Operation of Law.*—No delivery or transfer under subsection (b) not otherwise exempt shall be exempt because effected by operation of law. * * *

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(26 U.S.C. 1946 ed. and Supp. I, Sec. 1802.)

SEC. 1809. PAYMENT OF TAX.

(a) *By Whom Paid.*—The tax imposed by this chapter shall be paid by any person who makes, signs, issues, sells, removes, consigns, or ships any of the documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1809.)

Treasury Regulations 71 (1941 ed.), promulgated under the Internal Revenue Code:

SEC. 113.2. *Liability for Tax.*—The tax is payable by any of the parties to a taxable transaction. The parties to the transaction may agree among themselves as to which shall pay the tax, but such agreement does not relieve the others from their liability in the event it is not carried out.

No provisions, by-laws, or rules, of any exchange, and no custom, shall exempt any person from payment of the tax imposed.

SEC. 113.20. *Scope of Tax.*—Section 1802(a) imposes a tax upon each original issue of certificates (or shares when issued without certificates) of stock, or of profits, or of interest in property or accumulations by (1) any corporation, * * *. The tax applies to each original issue of the shares or certificates specified, ir-

respective of the purpose of the issue, the person to whom issued, or the time of delivery.

SEC. 113.24. *Issues Subject to Tax.*—The following are examples of issues subject to the tax:

* * * * *

(h) Stock issued in connection with a merger by the continuing corporation to the stockholders of the merging corporation; and, under certain circumstances, stock issued to the stockholders of the continuing corporation.

* * * * *

SEC. 113.25. *Issues Not Subject to Tax.*—In addition to the various issues specifically exempt under section 1808, as to which see Subpart J, the following are examples of issues not subject to the tax:

* * * * *

(c) The issue of certificates of stock in exchange for outstanding certificates representing the same stock as, for instance, to reflect a change in the name of the issuing corporation or to secure several certificates for one certificate or vice versa.

* * * * *

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.

SEC. 113.30. *Scope of Tax.*—Section 1802

(b) imposes a tax on sales, or agreements to sell, or memoranda of sales, of stock; on deliveries of stock with intent to pass title; on transfers of legal title to stock; on transfers of rights to subscribe for stock; and on transfers of rights to receive stock. The tax applies to the specified dealings or transactions in stock, whether made before, after, or without the issuance of a certificate, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, and without regard to whether the holder or transferee of the stock or specified right is entitled in any manner to the benefit thereof. The tax accrues at the time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, the stock or specified right, regardless of the time or manner of delivery of the certificate or agreement or memorandum of sale.

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